In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 409

LOS ANGELES HERALD EXAMINER, A DIVISION OF THE HEARST CORPORATION, ET AL., PETITIONERS

v.

SAN FRANCISCO-OAKLAND NEWSPAPER GUILD, ET AL., AND RALPH E. KENNEDY, REGIONAL DIRECTOR OF REGION 21 OF THE NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE REGIONAL DIRECTOR IN OPPOSITION

OPINIONS BELOW

The court of appeals rendered no opinion in denying intervention. The order, findings of fact, and conclusions of law of the district court in the underlying injunction suit (Pet. App. 4–17) are not officially reported.

319-698—68

JURISDICTION

The order denying intervention (Pet. App. 1) was entered on May 20, 1968. The petition for a writ of certiorari was filed on August 15, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the party who filed an unfair labor practice charge with the National Labor Relations Board is entitled to intervene as of right in the respondent's appeal from a temporary injunction issued by the district court under Section 10(l) of the National Labor Relations Act.

STATUTE INVOLVED

Section 10(l) of the National Labor Relations Act (29 U.S.C. 160(l)), is set forth in the petition at p. 3.

STATEMENT

Upon the filing of a charge by petitioners that respondent unions were engaging in a secondary boycott in violation of Section 8(b)(4)(B) of the National Labor Relations Act (29 U.S.C. 158(b)(4)(B)), respondent Kennedy, the Regional Director of the National Labor Relations Board, petitioned the United States District Court for the Northern District of California, pursuant to Section 10(l) for a temporary injunction. After a hearing,[1] the district

[1] The case was decided on the basis of the pleadings, the affidavits submitted by the Regional Director and the unions, the briefs of the parties, and the argument of counsel (Pet. App. 4).

court found reasonable cause to believe that the unions were engaging in such illegal conduct, and enjoined them from it pending a final determination of the matter by the Board (Pet. App. 4–17). When the unions appealed from the temporary injunction, petitioners sought to intervene in the court of appeals. That court initially granted intervention (Pet. App. 2–3), but, upon consideration of the opposition filed by the Regional Director and the unions, it rescinded that order and authorized petitioners "to appear and file a brief as amici curiae" (Pet. App. 1).

ARGUMENT

The action of the court below in denying intervention as of right to the charging party in an appeal taken from a temporary injunction issued under Section 10(l) of the Act is correct, and is not in conflict with *Local 238, U.A.W.* v. *Scofield*, 382 U.S. 205.

In *Scofield*, the Court held that, where the Board has entered an order at the culmination of unfair labor practice proceedings under Section 10(c) of the Act (29 U.S.C. 160(c)),[2] either the successful charging party (where the Board finds a violation of the Act (*Fafnir*)), or the successful respondent (where the Board dismisses the complaint (*Scofield*)) has the right to intervene in proceedings brought in the court of appeals to review the Board's order. The present case involves a different situation, in which

[2] The Court issued one opinion covering two cases—*Scofield* (which involved the successful respondent), and *Fafnir* (which involved the successful charging party).

the considerations that led the Court to permit intervention in *Fafnir* are not present.

The legislative history of Section 10(l) shows that Congress rejected proposals which would have empowered private parties to seek injunctive relief against secondary boycotts because of concern that such authority would revive the abuses which the Norris-LaGuardia Act (29 U.S.C. 101, *et seq.*) was intended to correct; instead, Congress relaxed the Norris-LaGuardia Act restrictions only in suits brought by the Board.[3] Unlike the administrative proceedings before the Board, where the person filing a charge participates as a "party" pursuant to agency regulations (see *Fafnir*, 382 U.S. at 219), Congress provided a more limited role for the charging party in Section 10(l). It is given notice of the filing of the injunction petition and "an opportunity to appear by counsel and present any relevant testimony." It does not become a party to the litigation, however, and thus may not enlarge the issues presented or the relief sought by the Regional Director, institute contempt proceedings, or appeal if the district court denies the injunction.[4] Petitioners furnish

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[3] See *Building & Constr. Trades Council* v. *Alpert*, 302 F. 2d 594, 597–598 (C.A. 1); *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F. 2d 183 (C.A. 4); *Bakery Sales Drivers Union* v. *Wagshal*, 333 U.S. 437, 442; *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 204.

[4] See *McLeod* v. *Business Machine and Office Appliance Mechanics Conference Board*, 300 F. 2d 237, 242–243 (C.A. 2); *Phillips* v. *United Mine Workers*, 218 F. Supp. 103 (E.D. Tenn.); cf. *Retail Clerks Union* v. *Food Employers Council*, 351 F. 2d 525 (C.A. 9).

no evidence that Congress intended the charging party to have greater rights in the court of appeals than it had in the district court.

Moreover, *Fafnir* involved a review of a final Board order, entered after full administrative proceedings, directing the respondent to cease and desist from an unfair labor practice. Sanctions could not be imposed for the violation of that order unless it was enforced by the appellate court. If the charging party were denied the right to participate fully at the appellate level, it might be deprived of the permanent relief which it sought and obtained through the administrative proceedings without having had an adequate opportunity to present its views. A temporary injunction under Section 10(l), on the other hand, is effective only during the pendency of the administrative proceedings; it is entered in an expedited proceeding (in the present case, the issue was submitted to the district court entirely on affidavits); and violation of the order is punishable as contempt. The injunction does not purport to be a final adjudication of the parties' rights under the Act, nor does appellate review, unlike the situation in *Fafnir*, involve direct review of the Board's action.

In view of the particular character of the injunctive remedy, and the fact that it may be obtained only at the instance of the Regional Director in judicial proceedings initiated and managed by him, we submit that Congress did not intend to permit the charging party to exercise the control over an appellate proceeding that would result if it had the right to intervene in the court of appeals in every such case.

Rather, we believe that the statutory scheme contemplates that the court of appeals may, as it did here, limit the charging party to participation as *amicus curiae*.[5] Private interests relevant to such proceedings may thereby be adequately presented.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition should be denied.

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Solicitor General.

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SEPTEMBER 1968.

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[5] In *McLeod* v. *General Electric Co.*, 366 F. 2d 847 (C.A. 2), vacated and remanded on other grounds, 385 U.S. 533, cited by petitioners (Pet. 13), the charging party was permitted to intervene in an appeal from a temporary injunction issued under Section 10(j) (29 U.S.C. 160(j)). It does not appear, however, that the issue was ever litigated in that case.

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